

**United States Court Of Appeals  
For The First Circuit**

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Nos. 15-1347; 15-1412

**GOOD SAMARITAN MEDICAL CENTER,  
Petitioner/Cross-Respondent,**

**v.**

**NATIONAL LABOR RELATIONS BOARD,  
Respondent/Cross-Petitioner.**

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Nos. 15-1877; 15-1941

**NATIONAL LABOR RELATIONS BOARD,  
Petitioner/Cross-Respondent,**

**v.**

**1199SEIU UNITED HEALTHCARE WORKERS EAST,  
Respondent/Cross-Petitioner**

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**On Petition for Review, Cross-Application for Enforcement, Application for Enforcement,  
Cross-Petition for Review of a Decision and Order of the National Labor Relations Board**

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**CORRECTED REPLY BRIEF OF RESPONDENT/CROSS-PETITIONER  
1199SEIU-UNITED HEALTHCARE WORKERS EAST**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
Introduction.....	1
I. The Board’s Brief Mirrors The ALJ’s Disregard And “Systematic Undervaluation” Of Substantial Record Evidence, And Fails To Point This Court To Substantial Evidence That Supports Implicit Credibility Determinations And Explicit Inferences Upon Which The Board’s Decision Rests.....	1
II. The Board Cannot Justify As “Within The Bounds Of Reason” Credibility Determinations That Are Implicit, Unexplained, And Take No Account Of Contrary Evidence. ....	4
III. The Board Does Not Point To Substantial Evidence Or Pertinent Board Precedent That Supports Its Finding That Lavigne Threatened Legley In Violation Of Section 8(b)(1)(A). ....	7
IV. The Board Misapplies The <i>Wright Line</i> Standard By Focusing On Whether Or Not Substantial Evidence Supports Finding That Legley Was Overly Rude Or Disrespectful At The Orientation, Rather Than On The Union’s Reasonable Belief That Legley’s Conduct Disrespected And Bullied Lavigne In A Manner That Overstepped Tolerable Bounds. ....	11
V. Substantial Evidence Does Not Support The Board’s Findings That The Union Caused Legley’s Discharge And Failed To Rebut A Presumption Of Unlawful Conduct, Under Either The Union’s Duty Of Fair Representation Analysis or Under <i>Wright Line</i> . ....	13
A. The Union Did Not Waive The Argument That Its Representatives Acted For Reasons Unrelated To Legley’s Protected Activity And In The Service Of Its Representational Duty To Its Constituency.....	14
B. The Evidentiary Record As A Whole Does Not Provide Substantial Evidence And The Cases Cited By The Board Do Not Support That The Union Violated Section 8(b)(1)(A) Or Section 8(b)(2).....	18

**VI. The Union Properly Directs This Court To Evidence Of ALJ Bias And Relies On Its Principal Brief To Substantiate The Contention; Should The Court Reject The Union’s Challenge To Any Back Pay Liability In The Event The Hospital’s Discharge Is Found Lawful, The Union Reserves The Right To Raise The Argument In A Compliance Proceeding Before The Board.....24**

**Conclusion.....24**

**Certificate of Compliance .....25**

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Allentown Mack Sales and Serv., Inc. v N.L.R.B.</i> , 522 U.S. 359, 118 S.Ct. 818, 139 L.Ed.2d 797 (1998) .....	2
<i>Cascade Employers’ Ass’n v. N.L.R.B.</i> , 404 F.2d 490 (9th Cir. 1968).....	15, 24
<i>M/V Cape Ann v. United States</i> , 199 F.3d 61 (1st Cir. 1999) .....	1
<i>N.L.R.B. v. American Art Industries, Inc.</i> , 415 F.2d 1223 (5th Cir. 1969).....	6
<i>N.L.R.B. v. Beverly Enterprises-Massachusetts, Inc.</i> , 174 F.3d 13 (1 <sup>st</sup> Cir 1999).....	2
<i>N.L.R.B. v. Elias Brothers Big Boy</i> , 327 F.2d 421 (6th Cir. 1964) .....	5
<i>N.L.R.B. v. Gateway Theatre Corp.</i> , 818 F.2d 971 (D.C. Cir. 1987) .....	24
<i>N.L.R.B. v. International Brotherhood of Teamsters, Local 251</i> , 691 F.3d 49 (1 <sup>st</sup> Cir. 2012).....	2
<i>N.L.R.B. v. Marine Optical, Inc.</i> , 671 F.2d 11 (1 <sup>st</sup> Cir. 1982).....	8
<i>N.L.R.B. v. Richards</i> , 265 F.2d 855 (3 <sup>rd</sup> Cir. 1959) .....	15, 16
<i>N.L.R.B. v. Saint-Gobain Abrasives, Inc.</i> , 426 F.3d 455 (1 <sup>st</sup> Cir. 2005).....	16
<i>N.L.R.B. v. Union Nacional de Trabajadores</i> , 540 F.2d 1 (1st Cir. 1976).....	7, 9

<i>Plumbers &amp; Pipe Fitters Local Union No. 32 v. N.L.R.B.</i> , 50 F.3d 29 (D.C. Cir. 1995) .....	19
<i>P. R. Mallory &amp; Co. v. N.L.R.B.</i> , 389 F.2d 704 (7th Cir. 1967).....	20
<i>Reno Hilton Resorts v. N.L.R.B.</i> , 196 F.3d 1275 (D.C. Cir. 1999) .....	22
<i>Ryan Iron Works, Inc. v. N.L.R.B.</i> , 257 F.3d 1 (1st Cir. 2001).....	5
<i>SFO Good-Nite Inn, LLC v. N.L.R.B.</i> , 700 F.3d 1 (D.C. Cir. 2012).....	5
<i>Sutter East Bay Hospitals v. N.L.R.B.</i> , 687 F.3d 424 (D.C. Cir. 2012).....	11, 12, 13
<i>UAW, Amalgamated Local Union No. 509, AFL-CIO &amp; Joe Moore, an Individual</i> , 28-CB-144872, 2015 WL 5241739 (Sept. 8, 2015).....	23
<i>Universal Camera Corp. v. N.L.R.B.</i> , 340 U.S. 474, 71 S.Ct. 456, L.Ed. 456 (1951) .....	2, 5, 6
<i>Woelke &amp; Romero Framing, Inc. v. N.L.R.B.</i> , 456 US 645 (1982).....	16

## **FEDERAL ADMINISTRATIVE DECISIONS**

<i>Acklin Stamping</i> , 351 NLRB 1263 (2007) .....	18
<i>Acklin Stamping</i> , 355 NLRB 824 (2010) .....	18
<i>American Art Industries, Inc.</i> , 166 NLRB 943 (1967) .....	6
<i>Amsted Industries</i> , 309 NLRB 860 (1992) .....	10

<i>Caravan Knight Facilities Management, Inc.,</i> 362 NLRB No. 196,.....	21
<i>Equitable Resources Exploration,</i> 307 NLRB 730 (1992) .....	22
<i>Flying Food Group, Inc.,</i> 345 NLRB 101 (2005) .....	8
<i>The Gulfport Stevedoring Ass’n—ILA Container Royalty Plan et al.,</i> 363 NLRB No. 10 (2015), 2015 WL 5678164.....	11
<i>In Re International Brotherhood of Teamsters, Local 391,</i> 357 NLRB No. 187 (Jan. 3, 2012) slip. op. at 1 & 2.....	7, 9
<i>Joseph Chevrolet, Inc. &amp; Local 324, Int’l Union of Operating Engineers, AFL-CIO-CLC,</i> 343 NLRB 7 (2004).....	8
<i>Lake Mary Health Care Assocs., LLC,</i> 345 NLRB 544 (2005) .....	8
<i>Local 144, Hosp., Nursing Home &amp; Allied Servs. Union,</i> 321 NLRB 399 (1996) .....	10
<i>Masland Indus.,</i> 311 NLRB 184 (1993) .....	22
<i>Nationsway Transport Service,</i> 327 NLRB 1033 (1999) .....	19
<i>Paperworkers Local 1048 (Jefferson Smurfit Corp.),</i> 323 NLRB 1042 (1997) .....	15
<i>SFO Good-Nite Inn,</i> 352 NLRB at 274 n. 5.....	5
<i>In Re SKD Jonesville Div. L.P.,</i> 340 NLRB 101 (2003) .....	8

*Town & Country Supermarkets,*  
340 NLRB 1410 (2004) .....15, 17

*Wright Line*  
251 NLRB 1083 (1980) .....11-15, 17, 23

**FEDERAL STATUTES**

Section 7 .....7, 10, 17, 23

Section 8(a)(1) .....8

Section 8(b)(1)(A) .....7, 9, 15, 18

Section 8(b)(2).....15, 18

### *Introduction*

1199SEIU-United Healthcare Workers East (“the Union”) hereby responds to the Brief of the National Labor Relations Board (“the Board”) with respect to the charges against the Union<sup>1</sup>. Overarching the Union’s challenges to the Board’s Decision is the pervasive failure of the ALJ—and the Board—to give fair consideration to all of the record evidence and to apply correct legal standards. The Board’s findings here are neither supported by substantial evidence based on the record as a whole, nor based on correct applications of law. The result is a decision holding the Union to have threatened and caused the discharge of Camille unlawfully based on a tenuous string of inferences that ignore the bulk of the record evidence without explanation and misapply the legal standard by which the Union’s conduct must be judged.

**I. The Board’s Brief Mirrors The ALJ’s Disregard And “Systematic Undervaluation” Of Substantial Record Evidence, And Fails To Point This Court To Substantial Evidence That Supports Implicit Credibility Determinations And Explicit Inferences Upon Which The Board’s Decision Rests.**

Nothing in the Board’s Brief to this Court (“BdBrf.”) effectively refutes the Union’s contention that in its Decision and Order, the Board failed to “consider[ ] the pertinent evidence ... [or] sufficiently articulate[ ] an explanation for its action.” *M/V*

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<sup>1</sup> All references herein to "the Act" refer to 29 USA §§ 150 et seq. All references to "Section" refer to sections of that statute.

*Cape Ann v. United States*, 199 F.3d 61, 63 (1st Cir. 1999), citing, *NLRB v. Beverly Enterprises-Massachusetts, Inc.*, 174 F.3d 13, 23 & n.2. Nor did the Board demonstrate its decision is “justified by a fair estimate of the worth of the testimony of witnesses....” *Universal Camera Corp.*, 340 U.S. 474, 490, 71 S.Ct. 456, 465-466, 71 S.Ct. 456 (1951) (“*Universal Camera*”). Rather the Board’s Brief mirrors, necessarily, the “systematic undervaluation of certain evidence” with respect to every element addressed in the Decision and Order below. *Allentown Mack*, 522 U.S. 359, 378, 118 S.Ct. 818, 828, 139 L.Ed.2d 797 (1998), cited in, *NLRB v. International Brotherhood of Teamsters, Local 251*, 691 F.3d 49 (1<sup>st</sup> Cir. 2012) (“*Teamsters Local 251*”). At best, the Board’s recitation of facts in its Brief, as in its Decision, is unsupported by substantial evidence, under Supreme Court and this Court’s standards. At worst, the recitations distort and misrepresent the record evidence as a whole.

Examples may be found throughout the Board’s Brief, and are referenced here merely by way of example:

- The Board contends that on December 19, after speaking with Lavigne, Leveille “called Nicholaides to complain that someone in his department had given Lavigne a hard time and questioned whether he needed to join the Union.” BdBrf. 8 (emphasis added). There is no treatment by the Board – in its Decision or its Brief – of Leveille’s testimony that she didn’t recall mentioning the content of Legley’s statements at all to Nicholaides. Nor is there treatment of Nicholaides’ testimony that the only mention of Union membership he recalled concerned the tone in which Legley questioned Lavigne. JA 322 (“Most of it was just in disbelief how the whole thing went and how upset Darlene had gotten. That we have never seen Darlene get that upset. She's been doing the orientations for quite a long time”).

- The Board mischaracterizes Nicholaides' brief, informal exchanges with Cadima and Patnaude on December 19 as "reporting" Legley, despite Nicholaides' express denial and his uncontradicted testimony that the content of Legley's questions and interruptions did not arise in either conversation. JA 212-220 ("I didn't report anything to her [Cadima]. I asked her a question;" "...I was very concerned for [Lavigne] when she called – she sounded over the phone like she was practically in tears;"<sup>2</sup> "Q. Did you discuss with her [Patnaude] his [Legley's] comments, as reported by Darlene, that he didn't have to join the Union? A. No.")).
- The Board's assertion that "Nicholaides (incorrectly) told Legley that Lavigne had complained about him to the Hospital's head of human resources and to the head of the Union" implicitly relies solely on Legley's testimony that such statements were made, implicitly rejects Nicholaides' unequivocal denial, and for the first time apparently incorporates evidence that undermines Legley's credibility by characterizing the alleged statements as "incorrect."<sup>3</sup>

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<sup>2</sup> Lavigne was in tears as she testified, a fact unremarked upon by the ALJ. JA 334-335.

<sup>3</sup> Legley's testimony that Nicholaides made such statements is not credible where no evidence supports even the likelihood that Nicholaides made them. There is no evidence Lavigne complained, or that Nicholaides had reason to believe she complained, to the "Hospital's head of human resources and the head of the Union" in Boston, or, as Legley's testimony goes on to assert, to "the head of personnel." JA 72. This is so especially where in testimony that immediately follows, Legley claimed Nicholaides told him that Lavigne usually got "90 percent" contributions to the Union's Political Action Fund, but didn't "get nothing from anybody this time because of [Legley]." Id. The latter assertion is flatly contradicted in the record not only by Lavigne's and Nicholaides' testimony, but also by Derby, who testified she did contribute to the Fund. JA 152, 495. Only to this Court, for the first time, does the General Counsel assert Nicholaides' alleged statements were "incorrect," a characterization never advanced to the Board. Rather, the Board here would co-opt impeaching evidence that went unaddressed by the ALJ and the Board, and that should have, but did not, factor in any explicated credibility determinations concerning Legley and Nicholaides.

- ♦ Substantial evidence does not support that Patnaude, Kenyon, and Watts “[i]n particular, ... discussed Legley’s assertion that employees could not be required to join a union as a condition of employment.” BdBrf. 9 (emphasis added). The fact that Legley’s statements about Union membership may have been mentioned does not amount to substantial evidence the statements played any role in the Hospital’s decision-making, where the overwhelming weight of the evidence described discussion of behaviors Legley exhibited beginning in early December, Patnaude’s misgiving about his hire before he even started, the time it would take to train him, and his isolation on a weekend evening shift – all of which facts are supported by substantial evidence, including Patnaude’s contemporaneous note on Legley’s Interview Checklist and her concerned call to Brennan the same day. JA 506.
- ♦ The Board’s finding that “there is no evidence that [Legley] was either disrespectful or ‘overly rude’” on December 5, BdBrf. 16, is flatly contradicted by Patnaude’s testimony that she reported him as “disrespectful” to Brennan, based on her own experience, immediately after she interviewed him on December 5. JA 252, 506. Neither the Board nor the ALJ takes account of Patnaude’s testimony or explains its apparent rejection.

## **II. The Board Cannot Justify As “Within The Bounds Of Reason” Credibility Determinations That Are Implicit, Unexplained, And Take No Account Of Contrary Evidence.**

The Board’s defense of its credibility determinations as “based on the sound credibility determinations of the administrative law judge,” BdBrf. 20, must fail where the ALJ failed to explicate in a single instance his choice between conflicting testimony or other evidence, although such choices are implicit throughout his narrative. To reach his conclusions, the ALJ necessarily and implicitly credited virtually all of Legley’s and Derby’s testimony, and discredited virtually all conflicting

testimony offered by Nicholaides, Jordan, Leveille, Patnaude, and Miller, concerning Legley's conduct and statements on December 5, at the Union orientation, and thereafter. See, e.g., *NLRB v. Elias Brothers Big Boy*, 327 F.2d 421, 425-426 (6th Cir. 1964) (rejecting ALJ's credibility determinations of witness whose testimony Court found to be vague, evasive, and inconsistent), quoting, *Universal Camera*, 340 U.S. at 488, 496, 71 S.Ct. at 464-465.

In this case, neither the Board's claim of "careful review" in a boilerplate footnote, unsubstantiated in the decisional text, nor the ALJ's unexplained and one-sided cherry-picking of controverted evidence warrants this Court's imprimatur. On the contrary, the Union's catalogue of unaddressed contrary evidence establishes that the ALJ's findings are unsupported by substantial evidence and its credibility determinations "overstep the bounds of reason." *Ryan Iron Works, Inc. v. NLRB*, 257 F.3d 1, 6 (1st Cir. 2001) (Noting with approval that Board accepted ALJ's credibility determination on one of three specified bases cited by ALJ, affirming finding of 8(a)(1) violation). In *Ryan Iron Works, Inc.*, as in every other case cited by the Board here, BdBrf. 20-21, the Board and ALJ detailed credibility determinations central to their respective conclusions by reference to specific traditional factors for assessing credibility. See, e.g., *SFO Good-Nite Inn, LLC v. NLRB*, 700 F.3d 1, 10 (D.C. Cir. 2012) (Board adopted ALJ's credibility determinations where rejected testimony found to be "unreliable," "shifting," and "evasive" [*SFO Good-Nite Inn*, 352 NLRB at 274 n. 5]).

Also unavailing is the Board's attack on the Union's impeachment of Derby's testimony by reference to the gaps in her memory. BdBrf. 21. Derby's credibility was undermined not by a failure to "remember some less significant details," or inconsistencies concerning "collateral matters." Board Brief at 21, citing, *NLRB v. American Art Industries, Inc.*, 415 F.2d 1223, 1227 (5th Cir. 1969) ("*American Art Industries*"). Rather, according to her testimony, Derby's memory failed concerning facts central to a proper assessment of her recall of what went on in the orientation. She did not remember how many employees attended, whether or not a management representative attended, could not say Lavigne didn't invite Legley to speak with her after the session, and did not recall whether Lavigne expressed feeling pressed for time, a central component of Lavigne's distress. The scope and level of detail with which a witness recalls an event is a traditional factor in assessing credibility.

The underlying Board and ALJ decisions in the *American Art Industries* case contrast sharply with the ALJ and Board decisions here. *American Art Industries, Inc.*, 166 NLRB 943 (1967). In the course of a twenty-page decision (excluding the Order and Appendix), the ALJ in *American Art Industries* specifically alluded to his credibility determinations no fewer than forty times, and detailed the bases for his choices. *Id.* In the decisions at issue before this Court, the Board mentions credibility once, in the standard footnote referencing *Universal Camera* (Add. 1), and the ALJ alludes to credibility exactly twice, in one instance without explanation or treatment of testimony to the contrary. Add. 8.

### III. The Board Does Not Point To Substantial Evidence Or Pertinent Board Precedent That Supports Its Finding That Lavigne Threatened Legley In Violation Of Section 8(b)(1)(A).

The standard for assessing whether a statement constitutes an unlawful threat under the Act is, as the Board notes, “whether a remark can be reasonably interpreted by an employee as a threat.” *In Re International Brotherhood of Teamsters, Local 391*, 357 NLRB No. 187 (Jan. 3, 2012) (“*Teamsters Local 391*”), slip. op. at 1; BdBrf. 22. The corollary proposition, also cited by the Board, is that to find a violation of Section 8(b)(1)(A), the statement’s “natural tendency ... [must be] to deter the exercise of [Section] 7 rights by employees who witness or learn of it.” *NLRB v. Union Nacional de Trabajadores*, 540 F.2d 1, 7 (1st Cir. 1976) (“*Union de Trabajadores*”); BdBrf. 22.

For Lavigne’s purported statement to violate Section 8(b)(1)(A), the statement must constitute a reasonably cognizable threat and reasonably must tend to interfere with the exercise of Section 7 rights. *Id.* Substantial evidence does not support either conclusion, in light of the vagueness of the statement, Lavigne’s lack of actual or apparent authority to affect Legley’s employment status, and the balance of Legley’s disruptive conduct during the orientation that preceded the statement – largely ignored by the ALJ – which did not concern Union membership or the exercise of any Section 7 right.

The Union has not found any case finding an unlawful threat in a statement as vague and innocuous as Lavigne’s, uttered on the heels of twenty minutes of

disruptive, unprotected conduct only punctuated by arguably protected content. Nor, apparently, has the Board found such a case. The majority of cases cited by the Board arise from statements made by supervisors to employees, where the authority of the employer fortifies any perception of threat to employment status. BdBrf. 24. *In Re SKD Jonesville Div. L.P.*, 340 NLRB 101, 1-102 (2003) (“*SKD Jonesville*”), and cases cited therein, all concern statements by supervisors. The statement at issue in *SKD Jonesville*, moreover, was found to be a threat in the context of an immediately preceding discussion by the supervisor of his desire to fire other employees for an unlawful reason (receipt of workers compensation). *Id.* at 101. In *Joseph Chevrolet, Inc. & Local 324, Int’l Union of Operating Engineers, AFL-CIO-CLC*, 343 NLRB 7, 8-9 (2004), a supervisor explicitly referred to protected activity in telling a terminated employee, in the presence of other employees at contract negotiations, “your job got f--ked up at the bargaining table.” *Flying Food Group, Inc.*, 345 NLRB 101, 105 (2005), concerned an employer’s showing employees an anti-union video during the year following union certification. In *Lake Mary Health Care Assocs., LLC*, 345 NLRB 544, 545 (2005), the Board assessed an employer’s announcement, two days before a union election, of the elimination of its practice of paying a shift bonus to certain employees. And in *NLRB v. Marine Optical, Inc.*, 671 F.2d 11 (1<sup>st</sup> Cir. 1982) (BdBrf. 22-23), this Court affirmed the Board’s ruling that the employer violated section 8(a)(1) of the Act when it told employees “that it intended not to recognize the Union or apply the contract ... and that significant working conditions would be different.” *NLRB v.*

*Marine Optical, Inc.*, 671 F.2d at 18 (1st Cir. 1982). All of these statements and actions carry the actual and apparent authority of the employer to affect directly the employees' terms and conditions of employment, and occurred in factual contexts that referred directly to union activity or other unlawful retaliation.

Of the cases cited by the Board that arise from conduct attributed to a respondent union, neither warrants analogy to the facts and circumstances here. In *NLRB v. Union Nacional de Trabajadores*, 540 F.2d 1 (1st Cir. 1976) (BdBrf. 22), unfair labor practice charges arose from a series of frankly violent incidents over a period of months at four jobsites, in which multiple members and officials of the respondent union participated. *Id.* at 5, 14. In *Teamsters Local 391*, the Board found a union violated Section 8(b)(1)(A) when, after the charging party filed an unfair labor practice charge at the Board, the union's business agent told a group of employees that "the fucking scab [i.e., the charging party] needs to be stopped." *Teamsters Local 391*, 357 NLRB No. 187, slip op. at 2. The Board noted its particular interest in protecting employees' freedom to avail themselves of the Board "lends further support to extending the reach of Section 8(b)(1)(A) beyond explicit calls for reprisals against charge filers to statements a reasonable employee would understand to imply as much." *Id.*

None of the above cases bear any resemblance to the circumstances here, either in the character of the statements at issue, or the context within which the statements occurred. Employee statements the Board has found to violate Section

8(b)(1)(A), moreover, typically are tied explicitly to protected activity and portend far harsher consequences than simply telling other employees about an individual's misbehavior. See, e.g., *Local 144, Hosp., Nursing Home & Allied Servs. Union*, 321 NLRB 399, 401 (1996) (Respondent union "would find out who signed cards for the rival Local ..., would get even with the employees, it would sue them, and they would end up with no medical insurance and possibly no job").

The Board also incorrectly dismisses the Union's citation to *Amsted Industries*, 309 NLRB 860 (1992) ("*Amsted Industries*"), as irrelevant to the issue of whether Lavigne's alleged statement unlawfully threatened or interfered with employees' exercise of Section 7 rights. BdBrf. 24; UBrf. 48-50. The significance of *Amsted Industries* rests in its counsel that substantial evidence does not support conclusions that 1) Lavigne's statement reasonably constitutes a threat cognizable under Board law, and 2) her statement interferes with Legley's exercise of a Section 7 right, where, as argued, the evidentiary record as a whole does not support that her comment responded to protected activity, rather than Legley's loud, commandeering behavior on all sorts of subjects. UBrf. 48-50.

**IV. The Board Misapplies The *Wright Line* Standard By Focusing On Whether Or Not Substantial Evidence Supports Finding That Legley Was Overly Rude Or Disrespectful At The Orientation, Rather Than On The Union’s Reasonable Belief That Legley’s Conduct Disrespected And Bullied Lavigne In A Manner That Overstepped Tolerable Bounds.**

The Board’s protest that substantial evidence does not establish that Legley was disrespectful or “overly rude” – by parsing of the words Patnaude, Cadima, Employee Health personnel or Union delegates used to describe Legley’s behavior – misses the point and misapplies the *Wright Line* analysis. BdBrf. 16-20. As stated by the United States Court of Appeals for the D.C. Circuit,

... the *Wright Line* test does not concern itself with whether the employee actually engaged in the misconduct.... In any case in which the evidence is disputed concerning the disciplined employee’s underlying misconduct, ... the trier of fact must determine whether the employer had a good faith belief in order to even begin an analysis of whether the employer would have imposed the same consequence in the absence of the anti-union animus.

*Sutter East Bay Hospitals v. NLRB*, 687 F.3d 424, 435 (D.C. Cir. 2012) (“*Sutter East Bay*”). The same analysis applies to assessing the Union’s motivation. *The Gulfport Stevedoring Ass’n–ILA Container Royalty Plan et al.*, 363 NLRB No. 10 (2015), 2015 WL 5678164 (*Wright Line* analysis applies identically to employer and union).

In *Sutter East Bay*, the Court vacated the Board’s decision adopting that of the ALJ, that the respondent employer disciplined and ultimately terminated an employee because of her support of a new union. *Sutter East Bay*, 687 F.3d at 434. Purporting to apply the *Wright Line* analysis, the ALJ found that the employee had not engaged in

the misconduct alleged by the hospital, and therefore concluded that the hospital disciplined her unlawfully because of her known protected activity. *Id.* at 436, 437.

Declining to enforce the Board's decision and order, the Court held that the ALJ misapplied *Wright Line* by failing to examine the employer's reasonable beliefs and how those reasonable beliefs might have informed its disciplinary actions. *Sutter East Bay*, 687 F.3d at 436. In this case, as in *Sutter East Bay*, the Board's argument that "substantial evidence supports the Board's finding that Legley was neither rude nor disrespectful," BdBrf. 16-20, fails because it focuses on the wrong question, ignores the proper question, and ignores all evidence pertinent to the proper question. *Sutter East Bay*, 687 F.3d at 436-437 (ALJ failed to consider whether employer reasonably believed misconduct had occurred); *id.*, at 437 (finding "the ALJ treated conflicting evidence ... with an almost breathtaking lack of evenhandedness," disregarded employer testimony "for the slightest of immaterial inconsistencies," and credited union witnesses notwithstanding "material contradictions"). See, e.g., UBrf. 34-38. Moreover, in *Sutter East Bay*, the Court rejected the argument advanced here by the Board vis-à-vis the Hospital, that the Hospital's failure to investigate Legley's conduct at orientation and elsewhere supports its conclusion that the Hospital acted unlawfully. BdBrf. 42-44.

Under the framing of the *Wright Line* test in *Sutter East Bay*, whether substantial evidence supports the ALJ's finding here that Legley was not "overly rude" or disrespectful is irrelevant (although it does not). The proper question, unaddressed by

the Board, is whether Nicholaides (and any other Union representative) reasonably and in good faith believed that Legley had rudely disrupted Lavigne's presentation in a manner so egregious as to cause her unprecedented emotional distress, unrelated to any protected activity. *Sutter East Bay*, 687 F.3d at 435-436. In light of their decades of personal knowledge of Lavigne, her performance as a delegate, and her unruffled composure in the face of innumerable situations, substantial evidence amply supports that Nicholaides' concern, expressed in multiple conversations in evidence, was genuine, reasonable, and unrelated to whatever otherwise protected content accompanied Legley's unprotected interruptions. The Board could point to no substantial evidence that Union concern about Lavigne's distress was not reasonable, or that any Union representative harbored discriminatory animus arising from Legley's statements about Union membership.<sup>4</sup>

**V. Substantial Evidence Does Not Support The Board's Findings That The Union Caused Legley's Discharge And Failed To Rebut A Presumption Of Unlawful Conduct, Under Either The Union's Duty Of Fair Representation Analysis or Under *Wright Line*.**

As argued in the Union's Principal Brief, substantial evidence does not support the finding that the Union caused Legley's discharge because, *inter alia*, the Board 1)

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<sup>4</sup> The Board's imputation of animus to the Union based on its finding that Lavigne uttered an unspecified threat to Legley, Add. 3, is not supported by substantial evidence. Other than her passing comment to Cadima, that Legley had given her a hard time (JA 335, 338), Lavigne did not speak with any Hospital representative until after the termination decision was made. There is no substantial evidence that Nicholaides or Leveille harbored any animus toward Legley related to his statements about Union membership, and all expected Legley to continue in employment.

ignored evidence of the totality of Legley's conduct; 2) applied an incorrect legal standard to find his conduct at orientation protected; 3) ignored all evidence of Lavigne's emotional reaction to Legley's conduct as a whole,<sup>5</sup> and of Union concern for her well-being; 4) ignored evidence of the Hospital's previous displeasure with Legley's disruptive conduct; 5) failed to substantiate that Nicholaides foresaw that his conversations with management would lead to Legley's discharge; and 6) demonstrated no evidence of Union animus against Legley specifically or non-members generally. UBrf. 25-38. Nevertheless, assuming for purposes of argument only that the Union did cause Legley's discharge, the Board did not and cannot show that substantial evidence supports its wholesale rejection of the Union's evidence that it acted based on reasonable concerns unrelated to protected conduct, in the service of its representational duty, and would have behaved identically absent any protected portion of Legley's behavior at orientation.

**A. The Union Did Not Waive The Argument That Its Representatives Acted For Reasons Unrelated To Legley's Protected Activity And In The Service Of Its Representational Duty To Its Constituency.**

The Board's claim that the Union waived the argument that it acted in accordance with its duty to represent its constituency, BdBrf. 30-32, fails for three

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<sup>5</sup> Among the evidence ignored, for example, was Derby's testimony that Lavigne appeared "really irritated with [Legley] for asking to make copies," evidence that supports the Union's position that it was Legley's commandeering of time and attention that disrupted and disturbed Lavigne, not any protected content to his interruptions. JA 148.

reasons. First, “... a party need not raise an issue initially before the Board where the issue is created by the Board’s own order.” *Cascade Employers’ Ass’n v. NLRB*, 404 F.2d 490, 492 (9th Cir. 1968) (“*Cascade Employers*”). The Decision of the ALJ in this case employed neither a *Wright Line* nor a duty of fair representation analysis: The ALJ expressly found the *Wright Line* analysis not to apply in his discussion of the charge against the Hospital, JA 593, and mentioned neither *Wright Line* nor the duty of fair representation analysis in holding the Union unlawfully caused Legley’s discharge. JA 594. Add. 10. The Board’s analysis departed completely from the ALJ’s cursory reasoning,<sup>6</sup> and so requires the Union to address in this Court questions of fact and law created in the first instance by the Board’s Decision and Order. *Cascade Employers*, 404 F.2d at 492; *NLRB v. Richards*, 265 F.2d 855, 862 (3<sup>rd</sup> Cir. 1959) (“*Richards*”) (“Neither the National Labor Relations Act nor the Board’s rules require that a question of law created by the Board’s order be raised initially before the Board by a

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<sup>6</sup> The ALJ’s reasoning concerning the Union’s liability reads, in its entirety: Although I think this a close call, it is my opinion that the Union’s delegates, knowing of the Company’s Workplace Civility Policy, reasonably would have foreseen that Lavigne’s complaints about Legley’s “bad” behavior on his first day of employment, would likely lead to his discharge. As a consequence, her reports to her union colleagues which were transmitted to management, were in my opinion, the proximate cause of his discharge. I therefore conclude that in these circumstances, the Union is at least partially responsible for Legley’s illegal discharge. Accordingly, I conclude that the Union caused or attempted to cause his discharge in violation of Section 8(b)(2) and 8(b)(1)(A) of the Act. Cf. *Town & Country Supermarkets*, 340 NLRB 1410, 1411 (2004) and *Paperworkers Local 1048 (Jefferson Smurfit Corp.)*, 323 NLRB 1042, 1044 (1997).’

JA 594.

proceeding analogous to a petition for rehearing in an appellate court or a motion to amend the judgment in a trial court. [Citations omitted]”).

Nor does *Woelke & Romero Framing, Inc. v. NLRB*, 456 US 645, 666 (1982) (“*Woelke*”) or *NLRB v. Saint-Gobain Abrasives, Inc.*, 426 F.3d 455, 457 (1<sup>st</sup> Cir. 2005) (“*St. Gobain*”), counsel a different result under the circumstances of this case. Bd. Brf. at 31. *Woelke* is inapposite where at issue in that matter was a petitioner’s claim of illegal union conduct raised for the first time in the Court of Appeals, not, as here, an affirmative defense to an analysis that first appeared in the Board’s decision. *NLRB v. Richards*, 265 F.2d at 862. In *Saint-Gobain*, this Court rejected the petitioner’s challenges to three specific aspects of a Board remedy to which, below, the respondent employer had excepted in the broadest possible terms. *Saint-Gobain*, 426 F.3d at 460. The Union’s Exceptions and Supporting Brief below responded in detail to an ALJ Decision that did not find the Union liable for a breach of its duty of fair representation (“DFR”), or even mention the DFR analysis. JA 674-687, 692-694.<sup>7</sup> Under these circumstances, neither the Act nor Board or Court precedent precludes

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<sup>7</sup> The Board simultaneously cites to the parties’ briefs in support of exceptions and protests their inclusion in the Joint Appendix. BdBrf. 31, n.10. However the Board agreed to the contents of the Joint Appendix, and its waiver argument renders the content of the Union’s brief relevant, albeit solely to the extent its contents fall within the scope of the exceptions submitted. 29 C.F.R. § 102.46 (“the brief in support of exceptions shall contain no matter not included within the scope of the exceptions”). See, JA 674-687, 692-694.

the Union from challenging a theory of liability propounded for the first time in the Board's decision.

A second reason the Board's waiver argument fails, moreover, is that the evidence and arguments marshaled here to show the Union acted for reasons consistent with its representational duty are identical to those presented to the Board in arguing the ALJ should have applied *Wright Line*. See, e.g., UBrf. 44-46; JA 674-687, 692-694; see, also, note 8, *supra*. For example, the substantial evidence of Union representatives' response to Lavigne's emotional distress, cited to support that the Union would have discussed Legley with management absent any protected content among his disruptions of orientation, also supports that the Union acted in the service of representing its constituency and protecting delegates from co-worker misconduct not tolerated generally. See, e.g., JA 200-201, 205-206. See, e.g., *Town & Country Supermarkets*, 340 NLRB 1410, 1413 (2004) ("*Town & Country*") (where an employer has a rule against certain misconduct, "the employer is not required to discriminate in favor of Section 7 by permitting such threats in a Section 7 context and prohibiting it in all other contexts").

Finally, it bears noting that the Union asserted in its Answer to the Complaint that, "Any taken by the Respondent Union were taken for lawful reasons and in the performance of its duty of fair representation," JA 26, a proposition that falls within the scope of the Union's detailed exceptions to each subsidiary finding of the ALJ, JA 643-648, and was supported in the Union's Brief In Support Of Exceptions. See, JA

674-694; note 12, *supra*.

**B. The Evidentiary Record As A Whole Does Not Provide Substantial Evidence And The Cases Cited By The Board Do Not Support That The Union Violated Section 8(b)(1)(A) Or Section 8(b)(2).**

The Board's defense of its findings that "the Union caused Legley's discharge by reporting him to the Hospital," failed to rebut the resulting presumption of unlawful conduct, and harbored animus against him, BdBrf. 28-38, rests on findings of fact that ignore all contrary evidence, without explanation, and inferences derived from those cherry-picked facts. See, UBrf., *passim*; *supra* at Points I, II. Nor does the case law on which the Board relies support the conclusions reached in the Decision and Order.

First, *Acklin Stamping*, 351 NLRB 1263 (2007) (Bd. Brf. 27, 29), hardly supports the Board's position in this case. There, the Board remanded an ALJ's finding that the union unlawfully procured an employee's discharge, because the ALJ failed to consider the evidence offered by the union of a non-discriminatory reason for its actions. *Id.* at 1263. Subsequently, in the *Acklin Stamping* case cited by the Union (UBrf. 44), the Board reversed the ALJ's finding on remand that the union there violated the Act, and held that the ALJ incorrectly required the union to prove the employee was unqualified, rather than prove it held a reasonable, good faith belief concerning the employee's lack of qualification. *Acklin Stamping*, 355 NLRB 824, 825-826 (2010). The Board noted also evidence (or lack thereof) ignored by the ALJ, including the lack of evidence of animus. *Id.* Here, as in the latter *Acklin Stamping*

case, the ALJ applied the wrong standard and ignored evidence that established the Union's good faith, reasonable, and non-discriminatory reason for acting.

Notably, the cases the Board cites as supporting authority on the issue of causation arise predominantly in the context of hiring halls and job referral systems, where Union conduct directly affects employees' employment status. See, *Plumbers & Pipe Fitters Local Union No. 32 v. NLRB*, 50 F.3d 29 (D.C. Cir. 1995) (BdBrf. 27) ("At issue here is the operation of a hiring hall, where the union has assumed the role of employer, as well as representative"); *Nationsway Transport Service*, 327 NLRB 1033, 1039-1041, 1045 (1999) ("*Nationsway*") (BdBrf. 30) (finding employer and union unlawfully interfered with charging party's employment, arising from a chain of events over a period of months related to union job referrals, arrangements with management concerning the ordering of seniority, and the union's specific, expressed displeasure with the manner in which the charging party obtained the top seniority on a particular job).

No evidence even approaching the causal relationship found in hiring hall and referral cases may be found in the evidence here: Substantial evidence does not support the Board's characterization of Nicholaides' brief conversations with Cadima and Patnaude as "reports," there is no evidence of Union request, suggestion, recommendation, or demand that the Employer discharge Legley, Add. 10, and the Board disregarded completely, without comment, virtually all of the testimony of Union witnesses about the cause for their concern about Lavigne, and of Hospital

witnesses about their decision-making conversation and reasoning. See, e.g., UBrf. 43-47; *supra* at 4-6. See, also, e.g., *P. R. Mallory & Co. v. NLRB*, 389 F.2d 704, 709 (7th Cir. 1967) (“The findings of the Board rested on tenuous inferences. These inferences are not entitled to deference on review when the evidence, as here, considered on the record as a whole, compellingly leads to contrary inferences”).

That Legley’s rude, disruptive conduct on the first day of his employment would have warranted the Hospital discharging him under any circumstances does not, in the absence of other substantial evidence, support that the Union delegates foresaw such a result. BdBrf. 30. There is no evidence of Union influence in employment decisions, the Union had no knowledge of the negative, disrespectful impressions Legley made previously on every Hospital representative with whom he interacted at Human Resources and Employee Health, and substantial evidence does not ground the Board’s inference of Union foresight, where the only record evidence supports the opposite conclusion – that Union delegates and representatives uniformly anticipated Legley’s continued employment. UBrf. 39-40, 50.

The Board misrepresents the evidentiary record to argue further that substantial evidence does not support that concern about Lavigne’s extreme distress motivated Union representatives to inquire of, and speak with management, about the orientation. Bd. Brf. at 31. The record contradicts, and does not support, the Board’s retort that Legley’s protected conduct “was mentioned at every step of the discussions between union delegates, and with the Hospital as well.” Notably, neither the Board’s

decision nor that of the ALJ so finds. See, also, e.g., UBrf. 10, 12-15. The Board also ignores and fails to explain any basis for its apparent rejection of Nicholaides' testimony that he did not mention the content of Legley's disruption to Cadima, and that the statements barely figured in any conversation with anyone else, including Leveille, Lavigne and Patnaude. *Id.* Even the Board's choice of the word "mentioned" signals that where such content may have been alluded to, it garnered no more than cursory, if any, attention.

The Board's suggestions that the Union analogizes to *Caravan Knight*, "a sexual harassment case, to theorize that Legley's alleged behavior was rooted in misogyny" misreads the cited case. BdBrf. 32, n.13. *Caravan Knight* did not concern sexual harassment, but an alleged threat issued by a female worker to a union steward. The opinion mentions sexual harassment in a parenthetical describing a different case, cited for the proposition that some behaviors employees direct at co-workers are serious enough to warrant union conversations with management. *Caravan Knight*, 362 NLRB No. 196, slip op. at 5. The Union cites the case for the proposition that the behaviors described by Lavigne – loud, repetitive, unprotected complaints and interruptions that brought her to tears – give rise to the Union's legitimate interest in inquiring of management concerning such conduct. The Board's further response, that "Legley was likely more at ease or interested in the boiler room than dealing with administrative matters," at 32, n. 13, is a speculation wholly ungrounded in evidence, albeit consistent with the record evidence that all of Legley's disrespectful conduct

was directed at women.

The Board's hyperbole rises to outright misrepresentation when it states, "In any event, the evidence supports that the Union acted on its animus in pushing for Legley's discharge." BdBr. 33, n.14 (emphasis supplied). There is no evidence, and the Board cites to none, of the Union "pushing for Legley's discharge," a fact especially clear in light of the ALJ's express finding, uncontroverted by the Board, that "[t]he evidence does not show that anyone from the Union asked for, suggested, recommended or demanded that the Employer discharge Legley." JA 594.

In attempting further to meet the substantial evidence standard, the Board cites to cases that include the timing of a party's action as circumstantial evidence of unlawful motivation. BdBrf. 34, and cases there cited. The opinions in those cases, and in the cases cited therein, consistently enumerate additional, specific bases for the inference of animus. *Masland Indus.*, 311 NLRB 184, 197 (1993) (BdBrf. 35) (citing employer's unlawful interrogation, unlawful promises, and unlawful threats to the drivers); *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1283 (D.C. Cir. 1999) (BdBrf. 35) ("inferences of anti-union motivation were virtually compelled" by management statements during union campaign that hotel would strongly consider contracting out jobs if Union prevailed in election); *Equitable Resources Exploration*, 307 NLRB 730 (1992) (citing timing "in the presence of independent acts of unlawful restraint and coercion"). In this case, there is no evidence that Union animus infected any conduct by Nicholaides or any other Union agent, and no history demonstrating such animus.

As far as Nicholaides and the other delegates were concerned, Legley had expressed during his initial interview in the department his comfort with the Union and they knew he had not hesitated to sign the check-off authorization despite having in hand instructions on how to exercise his Section 7 right not to join the Union. *UAW, Amalgamated Local Union No. 509, AFL-CIO & Joe Moore, an Individual*, 28-CB-144872, 2015 WL 5241739 (Sept. 8, 2015) (finding no violation of the Act where Union's safety and health representative, knowing that discipline might result, reported verbal altercation with employee because he was angry, not because of the discussion of safety issue that gave rise to altercation).

Finally, the Board's assertion that, "Lavigne's emotional reaction and its cause are irrelevant to the analysis of why the Union (via Nicholaides) reported Legley to management" (BdBrf. 36), disregards completely the substantial evidence that it was precisely the emotional reaction of a well-known, experienced, and heretofore unflappable veteran delegate that concerned Nicholaides and others, and prompted the queries of management. All such evidence, moreover, supports the Union's rebuttals under both *Wright Line* and the DFR analyses, that it would have behaved identically absent any arguably protected statements by Legley, and that it acted for reasons unrelated to protected conduct in the service of its representational duty.

**VI. The Union Properly Directs This Court To Evidence Of ALJ Bias And Relies On Its Principal Brief To Substantiate The Contention; Should The Court Reject The Union's Challenge To Any Back Pay Liability In The Event The Hospital's Discharge Is Found Lawful, The Union Reserves The Right To Raise The Argument In A Compliance**

### **Proceeding Before The Board.**

Two brief points remain: First, the Union properly directs this Court to evidence of ALJ bias not as an independent basis for non-enforcement of the Board's decision. Rather, the Union's showing supports its contention that the Board's decision is unsupported by substantial evidence because the ALJ did not give "fair consideration to all of the record evidence." *NLRB v. Gateway Theatre Corp.*, 818 F.2d 971, 974 (D.C. Cir. 1987).

Second, where the final decision of the Board found the Hospital to have violated the Act, this Court represents the first forum in which, at least theoretically, a decision may result that finds one party to have violated the Act and the other not. Accordingly, the remedial issue appropriately arises for the first time in this Court. *Cascade Employers' Ass'n v. NLRB*, *supra*, 404 F.2d at 492; *supra*, pp. 17-20. In any event, should this Court find the issue not properly before the Court, the Union reserves its right to raise the issue in a compliance proceeding before the Board.

### ***Conclusion***

For all the reasons set forth herein, 1199SEIU-United Healthcare Workers East respectfully requests that this Court enter judgment granting the Union's petition for review, denying the Board's application for enforcement, and dismissing the Board's complaint against the Union in its entirety.

Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,754 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office 2013 in 14-point Garamond font.



***CERTIFICATE OF SERVICE***

I hereby certify that on May 31, 2016, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. I further certify that this document was served on the following individuals through the appellate CM/ECF system.

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